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## THERE'S NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING, TOO

Nowadays the First Amendment is the First Refuge of Scoundrels.

—S. Johnson and S. Fish

Lately, many on the liberal and progressive left have been disconcerted to find that words, phrases, and concepts thought to be their property and generative of their politics have been appropriated by the forces of neoconservatism. This is particularly true of the concept of free speech, for in recent years First Amendment rhetoric has been used to justify policies and actions the left finds problematical if not abhorrent: pornography, sexist language, campus hate speech. How has this happened? The answer I shall give in this essay is that abstract concepts like free speech do not have any "natural" content but are filled with whatever content and direction one can manage to put into them. "Free speech" is just the name we give to verbal behavior that serves the substantive agendas we wish to advance; and we give our preferred verbal behaviors *that* name when we can, when we have the power to do so, because in the rhetoric of American life, the label "free speech" is the one you want your favorites to wear. Free speech, in short, is not an independent value but a political prize, and if that prize has been captured by a politics opposed to yours, it can no longer be invoked in ways that further your purposes, for it is now an obstacle to those purposes. This is something that the liberal left has yet to understand, and what follows is an attempt to pry its members loose from a vocabulary that may now be a disservice to them.

Not far from the end of his *Areopagitica*, and after having celebrated

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the virtues of toleration and unregulated publication in passages that find their way into every discussion of free speech and the First Amendment, John Milton catches himself up short and says, of course I didn't mean Catholics, then we exterminate:

I mean not tolerated popery, and open superstition, which as it extirpates all religious and civil supremacies, so itself should be extirpate . . . that also which is impious or evil absolutely against faith or manners no law can possibly permit that intends not to unlaw itself.

Notice that Milton is not simply stipulating a single exception to a rule generally in place; the kinds of utterance that might be regulated and even prohibited on pain of trial and punishment constitute an open set; popery is named only as a particularly perspicuous instance of the advocacy that cannot be tolerated. No doubt there are other forms of speech and action that might be categorized as "open superstitions" or as subversive of piety, faith, and manners, and presumably these too would be candidates for "extirpation." Nor would Milton think himself culpable for having failed to provide a list of unprotected utterances. The list will fill itself out as utterances are put to the test implied by his formulation: would this form of speech or advocacy, if permitted to flourish, tend to undermine the very purposes for which our society is constituted? One cannot answer this question with respect to a particular utterance in advance of its emergence on the world's stage; rather, one must wait and ask the question in the full context of its production and (possible) dissemination. It might appear that the result would be ad hoc and unprincipled, but for Milton the principle inheres in the core values in whose name individuals of like mind came together in the first place. Those values, which include the search for truth and the promotion of virtue, are capacious enough to accommodate a diversity of views. But at some point—again impossible of advance specification—capaciousness will threaten to become shapelessness, and at that point fidelity to the original values will demand acts of extirpation.

I want to say that all affirmations of freedom of expression are like Milton's, dependent for their force on an exception that literally carves out the space in which expression can then emerge. I do not mean that expression (saying something) is a realm whose integrity is sometimes compromised by certain restrictions but that restriction, in the form of an underlying articulation of the world that necessarily (if silently) negates alternatively possible articulations, is constitutive of expression. Without restriction, without an inbuilt sense of what it would be meaningless to say or wrong to say, there could be no assertion and no reason for asserting it. The exception to unregulated expression is not a negative restriction but a positive hollowing

out of value—we are for *this*, which means we are against *that*—in relation to which meaningful assertion can then occur. It is in reference to that value—constituted as all values are by an act of exclusion—that some forms of speech will be heard as (quite literally) intolerable. Speech, in short, is never a value in and of itself but is always produced within the precincts of some assumed conception of the good to which it must yield in the event of conflict. When the pinch comes (and sooner or later it will always come) and the institution (be it church, state, or university) is confronted by behavior subversive of its core rationale, it will respond by declaring “of course we mean not tolerated ———, that we extirpate,” not because an exception to a general freedom has suddenly and contradictorily been announced, but because the freedom has never been general and has always been understood against the background of an originary exclusion that gives it meaning.

This is a large thesis, but before tackling it directly I want to buttress my case with another example, taken not from the seventeenth century but from the charter and case law of Canada. Canadian thinking about freedom of expression departs from the line usually taken in the United States in ways that bring that country very close to the *Areopagitica* as I have expounded it. The differences are fully on display in a recent landmark case, *R. v. Keegstra*. James Keegstra was a high school teacher in Alberta who, it was established by evidence, “systematically denigrated Jews and Judaism in his classes.” He described Jews as treacherous, subversive, sadistic, money loving, power hungry, and child killers. He declared them “responsible for depressions, anarchy, chaos, wars and revolution” and required his students “to regurgitate these notions in essays and examinations.” Keegstra was indicted under Section 319(2) of the Criminal Code and convicted. The Court of Appeal reversed, and the Crown appealed to the Supreme Court, which reinstated the lower court’s verdict.

Section 319(2) reads in part, “Every one who, by communicating statements other than in private conversation, willfully promotes hatred against any identifiable group is guilty of . . . an indictable offense and is liable to imprisonment for a term not exceeding two years.” In the United States, this provision of the code would almost certainly be struck down because, under the First Amendment, restrictions on speech are apparently prohibited without qualification. To be sure, the Canadian charter has its own version of the First Amendment, in Section 2(b): “Everyone has the following fundamental freedoms . . . (b) freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication.” But Section 2(b), like every other section of the charter, is qualified by Section 1: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits

prescribed by law as can be demonstrably justified in a free and democratic society.” Or in other words, every right and freedom herein granted can be trumped if its exercise is found to be in conflict with the principles that underwrite the society.

This is what happens in *Keegstra* as the majority finds that Section 319(2) of the Criminal Code does in fact violate the right of freedom of expression guaranteed by the charter but is nevertheless a *permissible* restriction because it accords with the principles proclaimed in Section 1. There is, of course, a dissent that reaches the conclusion that would have been reached by most, if not all, U.S. courts; but even in dissent the minority is faithful to Canadian ways of reasoning. “The question,” it declares, “is always one of balance,” and thus even when a particular infringement of the charter’s Section 2(b) has been declared unconstitutional, as it would have been by the minority, the question remains open with respect to the next case. In the United States the question is presumed closed and can only be pried open by special tools. In our legal culture as it is now constituted, if one yells “free speech” in a crowded courtroom and makes it stick, the case is over.

Of course, it is not that simple. Despite the apparent absoluteness of the First Amendment, there are any number of ways of getting around it, ways that are known to every student of the law. In general, the preferred strategy is to manipulate the distinction, essential to First Amendment jurisprudence, between speech and action. The distinction is essential because no one would think to frame a First Amendment that began “Congress shall make no law abridging freedom of action,” for that would amount to saying “Congress shall make no law,” which would amount to saying “There shall be no law,” only actions uninhibited and unregulated. If the First Amendment is to make any sense, have any bite, speech must be declared not to be a species of action, or to be a special form of action lacking the aspects of action that cause it to be the object of regulation. The latter strategy is the favored one and usually involves the separation of speech from consequences. This is what Archibald Cox does when he assigns to the First Amendment the job of protecting “expressions separable from conduct harmful to other individuals and the community.” The difficulty of managing this segregation is well known: speech always seems to be crossing the line into action, where it becomes, at least potentially, consequential. In the face of this categorical instability, First Amendment theorists and jurists fashion a distinction within the speech/action distinction: some forms of speech are not really speech because their purpose is to incite violence or because they are, as the court declares in *Chaplinsky v. New Hampshire* (1942), “fighting words,” words “likely to provoke the average person to retaliation, and thereby cause a breach of the peace.”